



**MICHAEL P. WALLS**  
VICE PRESIDENT  
REGULATORY & TECHNICAL AFFAIRS

January 17, 2017

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Office of Pollution Prevention and Toxics  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460-0001

Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

**Re: Comments of the American Chemistry Council on Standards for Small Manufacturers and Processors, EPA-HQ-OPPT-2016-0675 (81 Fed.Reg. 90840, December 15, 2016).**

Dear Sir or Madam:

The American Chemistry Council (ACC) is pleased to provide these comments on EPA's request for public comment on revision of the current size standards for small manufacturers and processors under the reporting and recordkeeping requirements of the Toxic Substances Control Act (TSCA).

ACC agrees with EPA's conclusion that a revision to the current standards for small manufacturers and processors under TSCA is necessary. The current TSCA standards – generally revenue-based standards – are outdated, given the significant technological development in the chemical industry. EPA's current revenue-based standards are so low that virtually any established chemical company is likely to exceed the sales criteria, particularly smaller specialty chemical manufacturers and processors. With the recent revisions to TSCA in the Frank R. Lautenberg Chemical Safety for the 21<sup>st</sup> Century Act (LCSA), Congress made clear that it considered appropriate standards to define small manufacturers and processors important to reducing burdens, enhancing compliance efficiencies, and promoting innovation.<sup>1</sup> ACC urges EPA to begin work as soon as possible to update the small manufacturer and processor standards.

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<sup>1</sup> EPA should also take account of the requirements of Section 3(2) of the Small Business Act, 15 U.S.C. §632(2) (2013) applicable to small business size standards:

(2) ESTABLISHMENT OF SIZE STANDARDS.—

(A) IN GENERAL.—In addition to the criteria specified in paragraph (1), the Administrator may specify detailed definitions or standards by which a business concern may be determined to be a small business concern for the purposes of this Act or any other Act.

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Section 8(a)(3)(C) of TSCA, as amended by LCSA, requires EPA to consult with the Small Business Administration (SBA) to review the adequacy of the standards by which small manufacturers and processors qualify for reduced reporting or recordkeeping requirements, and as noted in the December 15, 2016 Federal Register, to make a determination on whether revision is warranted.<sup>2</sup> That determination, in turn, must be reasonable and based on information regarding the quality, utility, and purposes of such standards. Unfortunately, EPA's preliminary finding in the December 15 notice appears to be generally based on the significant increase in the Producer Price Index (PPI) since the standard was first established, and little else. A broader articulation of EPA's basis for the small manufacturer and processor standards would assist stakeholders in comments on any subsequent rulemaking.

ACC believes there is considerable value to a review of the small business standard applicable under all TSCA provisions. There could be significant benefits to both EPA and the regulated community in the adoption of a single, consistent standard for small manufacturers and processors.<sup>3</sup> Although the vast majority of the TSCA standards reflect the \$40 million/\$4 million criteria, there are important differences.<sup>4</sup> Harmonization of the standard across all TSCA elements would reduce the potential for confusion and enhance compliance. At a minimum, TSCA regulations should make a consistent reference to a definition of "small manufacturers" and "small processors," particularly if the definitions differ.

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(B) ADDITIONAL CRITERIA.—The standards described in paragraph (1) may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof, or other appropriate factors.

(C) REQUIREMENTS.—Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard—

(i) is proposed after an opportunity for public notice and comment;

(ii) provides for determining—

(I) the size of a manufacturing concern as measured by the manufacturing concern's average employment based upon employment during each of the manufacturing concern's pay periods for the preceding 12 months;

(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years;

(III) the size of other business concerns on the basis of data over a period of not less than 3 years; or

(IV) other appropriate factors; and

(iii) is approved by the Administrator.

(Emphasis added). Because LCSA requires EPA to establish standards for small manufacturers and processors in consultation with SBA, it would appear that these requirements apply to EPA's current effort.

<sup>2</sup> ACC interprets the LCSA consultation requirement to apply to all TSCA-related rulemakings proposed or completed after the date of enactment. Thus, the requirement to consult SBA applies to the Agency's Nanoscale Reporting and Recordkeeping Rule (RIN 2070-AJ54). The Office of Management and Budget (OMB) completed its review of the rule on December 28, 2016, and the rule was published on January 12, 2017. The proposed rule would reduce the sales volume threshold for nanoscale reporting by 75%, from \$40 million to \$11 million. EPA should, at a minimum, adjust the small business definition as suggested in the Small Business Administration's comments on the proposed rule (August 5, 2015, attached). ACC believes that revenue alone is an insufficient measure for identifying small business. We submit that the nanoscale reporting rule should be subject to revision on the basis of EPA's revision of the small manufacturer and processor standards under TSCA, including a consultation specific to nanoscale manufacturers.

<sup>3</sup> For example, the small manufacturer standard is certainly important for the purposes of the section 5 new chemicals program, including the standards by which small manufacturers qualify for reduced fees for PMNs.

<sup>4</sup> See, e.g., EPA's small manufacturer definition for chemical information rules (40 C.F.R. 712.25(c), adopting a \$30 million total sales threshold), and the "small business" exemption for reporting on hexachloronorbomadiene (40 C.F.R. 7041.03)(which appears to be the only reference to "small business" in TSCA regulation).

ACC understands that EPA must complete a consultation with the SBA before moving to subsequent rulemaking to amend the TSCA small manufacturer and processor standards. That consultation was begun with correspondence between EPA and the SBA on December 7, 2016, and continues with SBA's correspondence in a response dated January 11, 2017. ACC believes work to update the standard can begin even before the consultation with SBA is complete, however. The significant changes in the PPI for Chemicals and Allied Products between 1988 and 2015 (upon which EPA's current standards were calculated) alone provide a compelling basis for an update of the standards,<sup>5</sup> but is certainly not the sole compelling basis for an update.

As EPA begins the process of revising the small manufacturer and processor standards, ACC suggests the Agency consider the value of eliminating or modifying the revenue-based standards to identify small manufacturers and processors. As noted earlier, a revenue-based standard by itself is not a meaningful indicator of a small business presence. If EPA ultimately decides to retain a revenue-based standard, the Agency should articulate its rationale in its subsequent rulemaking.

As noted by the SBA, the definition of a small business varies considerably depending on the industry in which the firm operates.<sup>6</sup> ACC notes that for NAICS Codes 325 (Chemical Manufacturing), SBA has adopted exclusively an employee-based definition, rather than a revenue-based standard. An employee-based standard has considerable merit.

The SBA has also noted its view that EPA has proposed a revision of the size standard "without fully examining all factors relevant to setting an appropriate small business size standard."<sup>7</sup> Indeed, SBA recommended that as EPA moves forward in developing TSCA size standards, that it engage in a robust discussion with small business interests, and convene a Small Business Advocacy Review Panel under 5 U.S.C. 609(b). These recommendations would be helpful in identifying suitable approaches to the new TSCA size standards.

For example, one approach might establish a size standard using average wages and wages as a percentage of industry shipments to estimate a shipments threshold that is roughly equivalent to the employment-based thresholds published by SBA. EPA might consider a methodology that also reflects shipments. For example, EPA might apply a methodology using SBA employment thresholds, average annual pay, and salaries and wages as a percentage of industry shipments, to determine the implied shipments proportionate to the employee thresholds. Although this approach could be refined, it provides another basis for integrating employee and wage/revenue information to identify small businesses, and looks to factors that are certainly consistent with the SBA Size Standard Methodology.<sup>8</sup> Attachment 2 provides an example of the methodology applied to NAICS Code 325.

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<sup>5</sup> As EPA noted in the December 15 notice, the PPI has increased more than 6 times the inflation index at which changes would otherwise have been warranted.

<sup>6</sup> See Attachment 1, SBA's February, 2016 size standards for NAICS Code 325.

<sup>7</sup> Letter dated January 11, 2017 from Darryl DePriest, Chief Counsel, Office of Advocacy, Small Business Administration, to EPA Administrator Gina McCarthy.

<sup>8</sup> See [https://www.sba.gov/sites/default/files/size\\_standards\\_methodology.pdf](https://www.sba.gov/sites/default/files/size_standards_methodology.pdf)

ACC looks forward to working with the Agency as it updates the standards to identify small manufacturers and small processors. If we can provide any additional information on our comments, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, reading "Michael P. Walls". The signature is written in a cursive style and is positioned above a faint, dotted rectangular box.

Michael P. Walls  
Vice President  
Regulatory & Technical Affairs

cc: Jim Jones  
Lynne Blake-Hedges

Attachments (3)



## U. S. Small Business Administration

### Table of Small Business Size Standards

#### Matched to

### North American Industry Classification System Codes

This table lists small business size standards matched to industries described in the North American Industry Classification System (NAICS), as modified by the Office of Management and Budget effective January 1, 2012. The latest NAICS codes are referred to as NAICS 2012.

The size standards are for the most part expressed in either millions of dollars (those preceded by "\$") or number of employees (those without the "\$"). A size standard is the largest that a concern can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the average annual receipts or the average employment of a firm. How to calculate average annual receipts and average employment of a firm can be found in 13 CFR § 121.104 and 13 CFR § 121.106, respectively.

SBA also includes the table of size standards in the Small Business Size Regulations, 13 CFR § 121.201. This table includes size standards that have changed since the last publication of 13 CFR § 121.

For more information on these size standards, please visit <http://www.sba.gov/size>.

If you have any other questions concerning size standards, contact a Size Specialist at your nearest SBA Government Contracting Area Office (list at the end of the table), or contact the Office of Size Standards by email at [sizestandards@sba.gov](mailto:sizestandards@sba.gov) or by phone at (202) 205-6618.

*These size standards are effective  
February 26, 2016*

NAICS Codes	NAICS Industry Description	Size Standards in millions of dollars	Size standards in number of employees
<b>Subsector 325 – Chemical Manufacturing</b>			
325110	Petrochemical Manufacturing		1,000
325120	Industrial Gas Manufacturing		1,000
325130	Synthetic Dye and Pigment Manufacturing		1,000
325180	Other Basic Inorganic Chemical Manufacturing		1,000
325193	Ethyl Alcohol Manufacturing		1,000
325194	Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing		1,250
325199	All Other Basic Organic Chemical Manufacturing		1,250
325211	Plastics Material and Resin Manufacturing		1,250
325212	Synthetic Rubber Manufacturing		1,000
325220	Artificial and Synthetic Fibers and Filaments Manufacturing		1,000
325311	Nitrogenous Fertilizer Manufacturing		1,000
325312	Phosphatic Fertilizer Manufacturing		750
325314	Fertilizer (Mixing Only) Manufacturing		500
325320	Pesticide and Other Agricultural Chemical Manufacturing		1,000
325411	Medicinal and Botanical Manufacturing		1,000
325412	Pharmaceutical Preparation Manufacturing		1,250
325413	In-Vitro Diagnostic Substance Manufacturing		1,250
325414	Biological Product (except Diagnostic) Manufacturing		1,250
325510	Paint and Coating Manufacturing		1,000
325520	Adhesive Manufacturing		500
325611	Soap and Other Detergent Manufacturing		1,000
325612	Polish and Other Sanitation Good Manufacturing		750
325613	Surface Active Agent Manufacturing		750
325620	Toilet Preparation Manufacturing		1,250

<b>NAICS Codes</b>	<b>NAICS Industry Description</b>	<b>Size Standards in millions of dollars</b>	<b>Size standards in number of employees</b>
325910	Printing Ink Manufacturing		500
325920	Explosives Manufacturing		750
325991	Custom Compounding of Purchased Resins		500
325992	Photographic Film, Paper, Plate and Chemical Manufacturing		1,500
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing		500

NAICS and Industry description	Average wages per employee (BLS 2015)	SBA employment threshold	Total wages of SBA SBA employment		Wages and salaries as % of shipments* (10-year ave.)	Implied Shipments proportionate to SBA employment threshold (\$ millions)
			threshold	threshold (\$ millions)		
NAICS 325110 Petrochemical manufacturing	\$125,515	1,000		\$126	5.4%	\$2,318
NAICS 325120 Industrial gas manufacturing	\$101,384	1,000		\$101	5.4%	\$1,872
NAICS 325130 Synthetic dye and pigment manufacturing	\$85,562	1,000		\$86	5.4%	\$1,580
NAICS 325180 Other basic inorganic chemical manufacturing	\$91,229	1,000		\$91	5.4%	\$1,685
NAICS 325193 Ethyl alcohol manufacturing	\$76,432	1,000		\$76	5.4%	\$1,411
NAICS 325194 Cyclic crude, intermediate, wood chemical mfg	\$74,999	1,250		\$94	5.4%	\$1,731
NAICS 325199 All other basic organic chemical mfg.	\$94,162	1,250		\$118	5.4%	\$2,173
NAICS 325211 Plastics material and resin manufacturing	\$91,105	1,250		\$114	7.3%	\$1,560
NAICS 325212 Synthetic rubber manufacturing	\$83,904	1,000		\$84	7.3%	\$1,149
NAICS 325220 Artificial fibers and filaments manufacturing	\$75,560	1,000		\$76	7.3%	\$1,035
NAICS 325311 Nitrogenous fertilizer manufacturing	\$88,456	1,000		\$88	7.4%	\$1,187
NAICS 325312 Phosphatic fertilizer manufacturing	\$92,966	750		\$70	7.4%	\$936
NAICS 325314 Fertilizer, mixing only, manufacturing	\$54,494	500		\$27	7.4%	\$366
NAICS 325320 Pesticide and other ag. chemical mfg.	\$90,880	1,000		\$91	7.4%	\$1,220
NAICS 325411 Medicinal and botanical manufacturing	\$108,078	1,000		\$108	15.8%	\$684
NAICS 325412 Pharmaceutical preparation manufacturing	\$131,314	1,250		\$164	15.8%	\$1,039
NAICS 325413 In-vitro diagnostic substance manufacturing	\$99,007	1,250		\$124	15.8%	\$784
NAICS 325414 Other biological product manufacturing	\$105,877	1,250		\$132	15.8%	\$838
NAICS 325510 Paint and coating manufacturing	\$71,268	1,000		\$71	11.2%	\$634
NAICS 325520 Adhesive manufacturing	\$74,541	500		\$37	11.2%	\$332
NAICS 325611 Soap and other detergent manufacturing	\$74,634	1,000		\$75	7.4%	\$1,004
NAICS 325612 Polish and other sanitation good mfg.	\$82,014	750		\$62	7.4%	\$827
NAICS 325613 Surface active agent manufacturing	\$78,518	750		\$59	7.4%	\$792
NAICS 325620 Toilet preparation manufacturing	\$60,184	1,250		\$75	7.4%	\$1,012
NAICS 325910 Printing ink manufacturing	\$67,422	500		\$34	12.2%	\$276
NAICS 325920 Explosives manufacturing	\$71,031	750		\$53	12.2%	\$436
NAICS 325991 Custom compounding of purchased resins	\$57,302	500		\$29	12.2%	\$235
NAICS 325992 Photographic film and chemical manufacturing	\$63,804	1,500		\$96	12.2%	\$784
NAICS 325998 Other miscellaneous chemical product mfg.	\$73,514	500		\$37	12.2%	\$301

\* based on 4-digit NAICS code





January 11, 2017

VIA REGULATIONS.GOV

The Honorable Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency

**Re: TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors (Docket ID. EPA-HQ-OPPT-2016-0675)**

Dear Administrator McCarthy:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments in response to the Environmental Protection Agency's (EPA) proposed rule, "TSCA Reporting and Recordkeeping Requirements; Standards for Small Manufacturers and Processors."<sup>1</sup> Advocacy agrees that revisions to the current size standard definitions under the TSCA 8(a) reporting requirements are warranted. However, Advocacy believes that EPA has proposed this determination without fully examining all factors relevant to setting an appropriate small business size standard. Advocacy recommends EPA consider a significantly broader set of factors in its development of size standards under TSCA and recommends that EPA engage in a robust consultation with affected small entities. Advocacy further suggests that EPA should convene a Small Business Advocacy Review panel under 5 U.S.C. 609(b) to help address this challenging issue.

**The Office of Advocacy**

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the

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<sup>1</sup> 81 Fed. Reg. 90840 (December 15, 2016).

<sup>2</sup> 5 U.S.C. §601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).



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[www.sba.gov/advocacy](http://www.sba.gov/advocacy)

RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

## **Background**

The Toxic Substances Control Act (TSCA)<sup>6</sup> gives EPA the authority to establish a small business size standard for purposes of the exemption from reporting under section 8(a) of TSCA.<sup>7</sup> The Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amends TSCA, requires EPA to "review the adequacy of the standards . . . and[,] after providing public notice and an opportunity for comment, make a determination as to whether revision of the standards is warranted."<sup>8</sup>

The EPA's existing size standard, promulgated in 1988, is based on total annual sales, with an exclusion for entities that manufacturer or control a high volume of chemicals. In this notice, EPA presents a preliminary determination that a revision is warranted "because of the magnitude of the increase in the PPI [Producer Price Index] since the last revision of the size standards and the current annual sales standard is comparatively low given current revenue-based size standards developed by SBA[.]"<sup>9</sup>

## **Advocacy's comments**

Advocacy agrees with EPA's preliminary determination that a revision to the size standard is warranted but believes that EPA is not considering the full range of factors necessary to make this determination or to set an appropriate size standard in future actions.

First, the presentation of inflation implies that the 1988 size standard is an appropriate baseline. Advocacy believes that EPA should be considering whether the existing size standard is structured appropriately, not just whether an inflation adjustment is warranted. For example, SBA sets size standards for different industrial sectors at the six-digit NAICS code level,<sup>10</sup> instead of the single one-size-fits-all-industries standard in EPA's existing regulations. EPA should be considering whether a revision is warranted based on the need to have different standards based on the industry. Also, SBA sets size standards for manufacturing and wholesale

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<sup>4</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>5</sup> *Id.*

<sup>6</sup> 15 U.S.C. § 2601 et seq. (1976)

<sup>7</sup> 15 U.S.C. § 2607(a)(3)(B).

<sup>8</sup> 15 U.S.C. § 2607(a)(3)(C); Pub. L. 114-182, § 8(a)(1)(B) (June 22, 2016).

<sup>9</sup> 81 Fed. Reg. at 90842.

<sup>10</sup> For background on SBA Size Standards, see SBA website, "Make Sure You Meet SBA Size Standards," (<https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards>)

industries based on the number of employees, not revenue or a measure of inventory volume. EPA should consider whether it is using the appropriate metric for the size of a business.

Second, a comparison between EPA's revenue-based size standards and SBA's revenue-based size standards is not appropriate. In general, SBA uses revenue-based size standards for service industries and employee-based size standards for manufacturing or wholesalers. A comparison of EPA's revenue-based size standard for industries subject to TSCA with SBA's revenue-based size standards for services industries is misleading because it conflates major industrial sectors with significantly different characteristics. It should not be used as basis for determining whether EPA's size standard has been set appropriately without significantly more data and analysis.

### **Recommendations**

Advocacy believes that EPA should be focused on developing the size standard through a rigorous methodology that evaluates the current state of regulated entities, not merely setting the stage for an adjustment of the current size standard for inflation. Advocacy strongly recommends that EPA consider a broader range of factors to determine the appropriate size standard for TSCA reporting. The SBA Size Standard Methodology<sup>11</sup> suggests consideration of such a range of factors, including, but not limited to, the following that EPA might agree are relevant in the context of TSCA reporting:

- Barriers to entry;
- Start-up and expansion costs;
- Extent to which covered industries/businesses are capital-intensive versus labor-intensive;
- Average firm size (employment and revenue);
- Industry competition and concentration;
- Growth trends; and
- Technological changes.

Advocacy further recommends that EPA allow for more granular consideration of industry subgroups. Reporting requirements may affect industry subgroups (*e.g.*, manufacturers vs. processors vs. importers) differently and may merit different size standards.

As EPA moves forward, Advocacy recommends EPA adopt best practices for creating and revising size standards. In particular, EPA should keep the following important principles in mind.

- EPA should propose and seek comment on a quantitative methodology to determine the appropriate size standard.
- Metrics used should rely on the best available and timely data available to EPA.
- Regulated entities must be able to easily calculate whether they qualify as small under the size standard.

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<sup>11</sup> [https://www.sba.gov/sites/default/files/size\\_standards\\_methodology.pdf](https://www.sba.gov/sites/default/files/size_standards_methodology.pdf)

Advocacy recommends EPA consult the SBA Size Standards Methodology webpage<sup>12</sup> as a helpful point of reference.

Finally, Advocacy recommends that EPA consider convening a panel under section 609(b) of the Regulatory Flexibility Act on revisions to these size standards. EPA should engage in broad consultation with a wide variety of affected small entities and by statute must consult with the SBA Administrator. The panel process would provide a useful forum for these interactions and encourage collaboration with Advocacy and the Office of Management and Budget on reasonable regulatory alternatives.

### **Conclusion**

Advocacy urges EPA to give full consideration to the above issues and recommendations. Advocacy is prepared to work with EPA on these size standards and would welcome the opportunity to engage in broader consultations on these issues.

If you have any questions or require additional information please contact me or Assistant Chief Counsel Tayyaba Waqar at (202) 205-6790 or by email at [twaqar@sba.gov](mailto:twaqar@sba.gov).

Sincerely,

/s/

The Honorable Darryl L. DePriest  
Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: The Honorable Howard Shelanski  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>12</sup> <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/size-standards-methodology>